

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

MARQUIS O. WHITE,	§	
TDCJ No. 1840448,	§	
	§	
Petitioner,	§	
	§	No. 3:21-cv-1553-B-BN
V.	§	
	§	(Consolidated with:
DIRECTOR, TDCJ-CID,	§	No. 3:21-cv-1554-B;
	§	No. 3:21-cv-1555-B-BN; and
Respondent.	§	No. 3:21-cv-1557-B-BN)

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE  
UNITED STATES MAGISTRATE JUDGE**

Petitioner Marquis O. White, a Texas prisoner, challenges through this consolidated *pro se* 28 U.S.C. § 2254 habeas action four Dallas County convictions: two for aggravated sexual assault of a child and two for sexual assault of a child. *See* Dkt. Nos. 1, 8; *State v. White*, Nos. F12-56960-U, F12-57100-U, F12-71366-U, F12-71367-U (291st Jud. Dist. Ct., Dall. Cnty., Tex.), *aff'd as modified*, Nos. 05-13-00261-CR, 05-13-00262-CR, 05-13-00263-CR, 05-13-00264-CR, 2015 WL 108151 (Tex. App. – Dallas Jan. 7, 2015, no pet.).

After his convictions were affirmed, the Texas Court of Criminal Appeals (the CCA) granted White's habeas applications seeking leave to file a petition for discretionary review (PDR) out of time. *See Ex parte White*, Nos. WR-83,982-01, -02, -03, -04, 2015 WL 6746478 (Tex. Crim. App. Nov. 4, 2015). But a PDR was never filed.

And, although White eventually sought state habeas relief, *see Ex parte White*, No. WR-83,982-05 (Tex. Crim. App.) (reflecting that the CCA received his writ on June 21, 2021), he failed to file the state habeas applications within one year after

the state convictions and sentences became final (that is, one year after the extended deadline to file a PDR), *see, e.g., Ex parte White*, No. W12-56960-U(B) (291st Jud. Dist. Ct., Dall. Cnty., Tex.) (application filed no sooner than May 2021); *see also Ex parte White*, No. WR-83,982-05 (Tex. Crim. App. Sept. 29, 2021) (denying habeas relief without written order).

Once the Court consolidated White's Section 2254 petitions and United States District Judge Jane J. Boyle referred them to the undersigned for pretrial management under 28 U.S.C. § 636(b), *see* Dkt. No. 8, the undersigned examined the petitions and entered an order questioning whether they were timely, setting out the chronology above and offering White an opportunity to respond, *see* Dkt. No. 9. He has since failed to respond or otherwise contact the Court.

So, now, more than one month past the deadline to respond, *see id.*, the undersigned enters these findings of fact, conclusions of law, and recommendation that the Court should dismiss the habeas petitions with prejudice as time barred under Rule 4 of the Rules Governing Section 2254 Cases (Habeas Rule 4).

### **Legal Standards**

Under Habeas Rule 4, a district court may summarily dismiss a Section 2254 habeas application "if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." *Id.*

This rule differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses. The district court has the power under [Habeas] Rule 4 to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state. This power is rooted in "the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on

the respondent by ordering an unnecessary answer.”

*Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) (quoting 28 U.S.C. foll. § 2254 Rule 4 Advisory Committee Notes).

And the Court may exercise this power to summarily dismiss White’s applications with prejudice as time barred under Habeas Rule 4.

“[E]ven though the statute of limitations provision of the AEDPA is an affirmative defense rather than jurisdictional,” a district court may dismiss a time barred Section 2254 application *sua sponte* under Habeas Rule 4. *Kiser*, 163 F.3d at 329. But, “‘before acting on its own initiative’ to dismiss an apparently untimely § 2254 petition as time barred, a district court ‘must accord the parties fair notice and an opportunity to present their positions.’” *Wyatt v. Thaler*, 395 F. App’x 113, 114 (5th Cir. 2010) (per curiam) (quoting *Day v. McDonough*, 547 U.S. 198, 210 (2006); alteration to original). As set out above, the Court provided notice, but White failed to respond. *Cf. Ingram v. Director, TDCJ-CID*, No. 6:12cv489, 2012 WL 3986857, at \*1 (E.D. Tex. Sept. 10, 2012) (a magistrate judge’s report and recommendation gives the parties “fair notice that the case may be dismissed as time-barred, which [gives a petitioner] the opportunity to file objections to show that the case should not be dismissed based on the statute of limitation” (collecting cases)).

AEDPA establishes a one-year statute of limitations for federal habeas proceedings brought under 28 U.S.C. § 2254. *See* ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, Pub. L. 104-132, 110 Stat. 1214 (1996). The limitations period runs from the latest of:

(A) the date on which the judgment became final by the conclusion of

direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

The time during which a properly filed application for state post-conviction or other collateral review is pending is excluded from the limitations period. *See id.* § 2244(d)(2).

The one-year limitations period is also subject to equitable tolling – “a discretionary doctrine that turns on the facts and circumstances of a particular case,” *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999), and only applies in “rare and exceptional circumstances,” *United States v. Riggs*, 314 F.3d 796, 800 n.9 (5th Cir. 2002) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). “[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.’” *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

Taking the second prong first, “[a] petitioner’s failure to satisfy the statute of

limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify." *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (per curiam) (citation omitted). This "prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond [the litigant's] control." *Menominee Indian Tribe*, 577 U.S. at 257.<sup>1</sup>

But "[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence.' What a petitioner did both before and after the extraordinary circumstances that prevented him from timely filing may indicate whether he was diligent overall." *Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019) (quoting *Holland*, 560 U.S. at 653; footnote omitted).

And, most applicable here, a showing of "actual innocence" can also overcome AEDPA's statute of limitations. See *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But the actual innocence gateway is only available to a petitioner who presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* at 401 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).

That is, the petitioner's new, reliable evidence must be enough to persuade the

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<sup>1</sup> See, e.g., *Farmer v. D&O Contractors*, 640 F. App'x 302, 307 (5th Cir. 2016) (per curiam) (holding that because "the FBI did not actually prevent Farmer or any other Plaintiff from filing suit" but instead "advised Farmer that filing suit would have been against the FBI's interest" and "that the RICO claims could be filed after the investigation concluded," "[a]ny obstacle to suit was ... the product of Farmer's mistaken reliance on the FBI, and a party's mistaken belief is not an extraordinary circumstance" (citation omitted)).

Court that “no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* at 386 (quoting *Schlup*, 513 U.S. at 329).<sup>2</sup>

### Analysis

The timeliness of most Section 2254 applications is determined under Section 2244(d)(1)(A), based on the date on which the judgment became final. A state criminal judgment becomes final under AEDPA “when there is no more ‘availability of direct appeal to the state courts.’” *Frosch v. Thaler*, No. 2:12-cv-231, 2013 WL 271423, at \*1 (N.D. Tex. Jan. 3, 2013) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009)), *rec. adopted*, 2013 WL 271446 (N.D. Tex. Jan. 24, 2013).

White’s convictions became final when he failed to file a PDR in 2015. *See Phillips v. Quarterman*, No. 3:09-cv-1131-B, 2009 WL 1974302, at \*2 (N.D. Tex. July 7, 2009) (citing *Roberts v. Cockrell*, 319 F.3d 690, 692 (5th Cir. 2003)); *Salinas-Tinoco*

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<sup>2</sup> *See also Johnson v. Hargett*, 978 F.2d 855, 859-60 (5th Cir. 1992) (“The Supreme Court has made clear that the term ‘actual innocence’ means *factual*, as opposed to *legal*, innocence – ‘legal’ innocence, of course, would arise whenever a constitutional violation by itself requires reversal, whereas ‘actual’ innocence, as the Court stated in *McCleskey [v. Zant]*, 499 U.S. 467 (1991), means that the person did not commit the crime.” (footnotes omitted)); *Acker v. Davis*, 693 F. App’x 384, 392-93 (5th Cir 2017) (per curiam) (“Successful gateway claims of actual innocence are ‘extremely rare,’ and relief is available only in the ‘extraordinary case’ where there was ‘manifest injustice.’ *Schlup*, 513 U.S. at 324, 327. When considering a gateway claim of actual innocence, the district court must consider all of the evidence, ‘old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.’ *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks and citations omitted). ‘Based on this total record, the court must make “a probabilistic determination about what reasonable, properly instructed jurors would do.” *Id.* (quoting *Schlup*, 513 U.S. at 329). ‘The court’s function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.’ *Id.*” (citations modified)).

*v. Davis*, No. 3:18-cv-1781-G-BN, 2018 WL 3979865, at \*3 (N.D. Tex. July 25, 2018) (collecting cases), *rec. accepted*, 2018 WL 3973507 (N.D. Tex. Aug. 20, 2018).

And, because White filed his state habeas applications in 2021, *see Ex parte White*, W12-56960-U(B), they were “not filed within the one-year period” that commenced in 2015; they therefore “did not statutorily toll” the time to seek federal habeas relief. *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013) (citing *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (citing, in turn, 28 U.S.C. § 2244(d)(2))).

Accordingly, the applications are due to be denied as untimely absent statutory or equitable tolling of the limitations period or establishment of actual innocence. But, particularly given that White never replied to the limitations interrogatories, he has neither shown how another provision of Section 2244(d)(1) could apply here, nor advanced a claim of tolling under the narrow actual innocence gateway, nor established either prong of equitable tolling – that he pursued his rights diligently and that an extraordinary circumstance beyond his control prevented the timely filing of the federal habeas petitions. The Court should therefore dismiss this consolidation action with prejudice as time barred.

#### **Recommendation and Directions to Clerk**

Under Rule 4 of the Rules Governing Section 2254 Cases, the Court should dismiss Petitioner Marquis O. White’s 28 U.S.C. § 2254 habeas applications with prejudice. And the Court should direct that the Clerk of Court serve any order accepting or adopting this recommendation on the Texas Attorney General.

The Clerk shall serve electronically a copy of this recommendation and the

petition, along with any attachments thereto and brief in support thereof, on the Texas Attorney General as counsel for Respondent, directed to the attention of Edward L. Marshall, Chief, Criminal Appeals Division, Texas Attorney General's Office. *See* RULE 4, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: November 8, 2021



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DAVID L. HORAN  
UNITED STATES MAGISTRATE JUDGE